

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

LUTHER SPENCER,
Plaintiff,

vs.

MICHAEL B. COLBERT, *et al.*,
Defendants.

Case No. 1:13-cv-782

Weber, J.
Litkovitz, M.J.

**REPORT AND
RECOMMENDATION**

Plaintiff, a resident of Mansfield, Ohio, brings this action pro se alleging that defendants Michael B. Colbert, Joseph Blaker, Gregory Gantt, Sylvester Patton, Ed Good, and Governor John R. Kasich violated his rights under the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act of 1973, and 42 U.S.C. § 1983. This matter is before the Court on plaintiff's motion for summary judgment. (Doc. 7).

Plaintiff's motion for summary judgment is as follows:

- 1) ALL (DEFENDANTS) HAVE OVER (60) days in which to respond to complaint.
- 2) all (defendants) [fail] to do so.
- 3) Plaintiff request summary judgement (sic) (against) all defendants. And that they defendants be to give a copy of plaintiff case history file be submmitted (sic) to this court. A COPY SENT TO PLAINTIFF, ALL (COMMUN[ICA]TION, TAPES, RECORDING, PAPER WORK, DOCUMENTS AND ETC...).

(Doc. 7). As plaintiff's motion is based on defendants' failure to respond to his complaint, the Court construes it as a motion for default judgment under Federal Rule of Civil Procedure 55.

Entry of default judgment is only appropriate where a defendant has failed "to plead or otherwise defend" against a properly served lawsuit. Fed. R. Civ. P. 55. Plaintiff bears the burden of showing that defendants have been effectively served with process. *Id.*; *Abel v. Harp*, 122 F. App'x 248, 250 (6th Cir. 2005). Plaintiff has failed to carry his burden as the record

demonstrates that the United States Marshall was unable to effect service on any of the defendants. *See* Doc. 8. The summons forms completed by plaintiff list “30 East Broad Street, Columbus, OH 43218” as the address for serving the defendants. (*Id.*). Pursuant to this Court’s November 22, 2013 Order, the United States Marshal Service attempted to serve defendants at the address provided by plaintiff. (*Id.*). However, each summons form was returned unexecuted with a United States Postal Service stamp reading: “Return to Sender Attempted Not Known.” (*Id.*). It therefore appears that the address provided by plaintiff on the summons forms was incorrect.

Proper service of process is required in order for this Court to obtain in personam jurisdiction over each defendant. *O.J. Distrib., Inc. v. Hornell Brewing Co., Inc.*, 340 F.3d 345, 353 (6th Cir. 2003). Plaintiff bears the burden of exercising due diligence in perfecting service of process and of showing that proper service has been made. *Habib v. General Motors Corp.*, 15 F.3d 72, 74-5 (6th Cir. 1994). *See also Byrd v. Stone*, 94 F.3d 217 (6th Cir. 1996). In the absence of a showing of good cause justifying the failure to timely serve the complaint, the Court may either dismiss the complaint without prejudice or direct that service of process be effected within a specified time. *See* Fed. R. Civ. P. 4(m). Rule 4(m) provides, in pertinent part, as follows:

If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

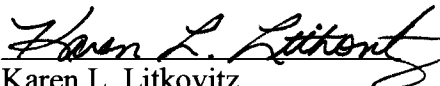
Fed. R. Civ. P. 4(m).

Plaintiff’s complaint was filed on November 22, 2013. (Doc. 4). Plaintiff therefore had until March 24, 2014, to serve defendants. The summons were returned unexecuted on March

12, 2014. (Doc. 8). As of the date of this opinion, plaintiff has not submitted new summons with proper addresses for any of the defendants. Accordingly, plaintiff is hereby notified that the Court proposes to dismiss this action against defendants without prejudice. *U.S. v. Gluklick*, 801 F.2d 834, 836-37 (6th Cir. 1986). Therefore, plaintiff is **ORDERED** to show cause, in writing, within **twenty (20) days** why his complaint should not be dismissed.

In conclusion, the Court **RECOMMENDS** that plaintiff's motion for summary judgment (Doc. 7) be **DENIED** as defendants have not been properly served with summons and complaints. Further, **IT IS HEREBY ORDERED** that plaintiff to show cause, in writing and within **thirty (30) days**, why his lawsuit should not be dismissed pursuant to Fed. R. Civ. P. 4(m) for failure to effect timely service.

Date: 5/22/14


Karen L. Litkovitz
United States Magistrate Judge

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

LUTHER SPENCER,
Plaintiff,

vs.

MICHAEL B. COLBERT, *et al.*,
Defendants.

Case No. 1:13-cv-782

Weber, J.
Litkovitz, M.J.

NOTICE

Pursuant to Fed. R. Civ. P. 72(b), **WITHIN 14 DAYS** after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. This period may be extended further by the Court on timely motion for an extension. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendation is based in whole or in part upon matters occurring on the record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon, or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections **WITHIN 14 DAYS** after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Luther Spencer
712 Washington Ave.
Mansfield, OH 44903

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X

☒ Agent

☐ Addressee

B. Received by (Printed Name)

C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type

☒ Certified Mail

☐ Express Mail

☐ Registered

☐ Return Receipt for Merchandise

☐ Insured Mail

☐ C.O.D.

4. Restricted Delivery? (Extra Fee)

☐ Yes

2. Article Number

(Transfer from service label)

7011 3500 0001 5345 5703

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540